

# Burning issues in the “Land of the Future”

## Conflicts over indigenous lands and the Amazon in Brazil

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*“Keinem Lande hat es sich durch eine besonders komplizierte Konstellation g  
Brasilien, und keines hat es – und dies dankbar zu bezeugen, schreibe i  
glücklicher und vorbildlicher Weise gelöst wie Brasilien. In einer V  
persönlichen Meinung nicht nur die Aufmerksamkeit, sondern auch die Bew*

Stefan Zweig, *Brasilien - Ein L*

Since his first visit, [Stefan Zweig](#) had been fascinated by Brazil. Friendly people, good weather, and terrific landscapes. This fascination has led Zweig to publish a book called *Brazil, Land of the Future (Brasilien – Ein Land der Zukunft)*. In this book, Zweig praised Brazil for its success in mixing individuals and groups, a true role model for multicultural societies. However, this supposed harmonious coexistence of multiple cultures in Brazil hides relationships that have been changing over time, including through bloody historical conflicts. Land conflicts over indigenous territories are an illustrative case in point.

Indigenous lands are the basis for securing the survival of indigenous peoples, who traditionally possess their lands without official land titles. Conversely, due to their

abundant natural resources, indigenous lands are highly desired commodities for non-indigenous people who again and again attempt, legally or illegally, to take control of those lands. What is notable in this context is that land conflicts do not concern a controversy on the existence of land rights. Brazil's 1988 constitution provides a solid legal regime for protecting indigenous lands. Rather, land conflicts relate to the implementation of this legal regime. In this regard, recent administrative measures [adopted](#) by the Brazilian government have caught the attention of the international community.

## **Socio-Environmentalism and Forest Peoples**

To understand the legal framework regarding indigenous lands, the concept of socio-environmentalism (*socioambientalismo*), which was introduced by the Brazilian constitution, is crucial. This word is a combination of “*socio*” (society) and “*ambiente*” (environment), meaning that the protection of nature should go hand in hand with the protection of the societies living in it. This concept of socio-environmentalism was one of the results of the [active participation](#) of indigenous leaders in the drafting of the constitution. Indeed, the Brazilian constitution was very innovative, considering that a similar notion of socio-environmentalism developed more clearly in the international community only years later with the adoption of the 1992 Convention on Biological Diversity.

In Brazil, the socio-environmental framework elevates state obligations to constitutional status, including the obligation of protecting forest peoples. Such peoples include, among others, Afro-descendant communities, peasant communities, and, of course, indigenous peoples. Legally speaking, indigenous peoples are “Indians” whose customs and lands are protected under Article 231 of the [constitution](#). To avoid a [long historical controversy](#), socio-legal scholarship refers to indigenous peoples as “*Amerindians*.” This terminology contrasts with the notions of “Aboriginals” or “First Nations” that exist in common law countries, e.g., Australia and Canada. In line with international human rights instruments such as the ILO Convention 169, the main criterion for the identification of “*Amerindians*” is self-identification (Articles 231–232 of the constitution read in conjunction with Article 3 of [Law 6001/1973](#) and Article 1 of [Presidential Decree 5051/2004](#)).

[According](#) to the UN Special Rapporteur on the Rights of Indigenous Peoples (2009), Brazil has an exemplary model for securing indigenous land rights. In contrast to other countries, such as Chile, Brazil has established a constitutional regime for protecting indigenous territories. This means that indigenous land rights are at the top of the normative hierarchy of the Brazilian legal system. Remarkably, traditional indigenous possession is protected as an original right to land. The Brazilian constitution recognizes indigenous peoples as original landowners, and it is up to the state to protect and ensure respect for indigenous lands. According to the jurisprudence of the Brazilian Supreme Court, especially in the [case](#) of the indigenous land of *Raposa Serra do Sol*, indigenous peoples who possessed their lands at the time of the constitution's promulgation have land rights that triumph over any eventual title over their lands. Indigenous lands in Brazil cannot be sold or transferred, and they are intended for the permanent possession of indigenous peoples.

## **Current implementation of indigenous land rights in Brazil (2019)**

A statutory scheme articulates the Brazilian constitutional regime regarding indigenous lands. The operative part of this scheme is the responsibility of the National Indian Foundation (FUNAI). For decades, FUNAI has been responsible for the so-called demarcation of traditional indigenous lands. Concisely, demarcation is the process through which the state establishes, with the participation of indigenous peoples, the borders of claimed indigenous lands and issues corresponding land titles. This process is highly complex and spread over different stages in accordance with the 1996 [Presidential Decree 1775/96](#). On the [international level](#), the Brazilian regulatory scheme for protecting indigenous lands has been viewed as an adequate instrument for a state to comply with human rights standards.

In January 2019, the Brazilian government started a new series of attempts to change the consolidated scheme of indigenous land demarcation. Immediately after his inauguration, President Jair Bolsonaro adopted the [Provisional Measure 870/2019](#), which shifted the responsibility for demarcating indigenous lands from FUNAI – under the Ministry of Justice – to the Ministry of Agriculture. This measure entered into force immediately and faced opposition from indigenous peoples. To Professor Manuela Carneiro da Cunha of the University of Sao Paulo, this measure revived a [long-standing controversy](#) surrounding indigenous issues in Brazil. According to her, the shifting of FUNAI's responsibility created a conflict of interest in the Ministry of Agriculture, which is similar to the situation in the 1970s. On the one hand, the Ministry of Agriculture had to demarcate indigenous lands for the exclusive use of indigenous peoples. On the other, it had to manage the economic interest of the agricultural sector in exploiting natural resources within indigenous lands.

Both the legislative and judicial branches have influenced the practical effects of Provisional Measure 870/2019. Pursuant to Article 62 of the Brazilian constitution, the president must submit provisional measures to the National Congress for approval, which may reject or modify them. This is what happened with Provisional Measure 870/2019. In approving it, the congress changed the text and shifted the responsibility of demarcation of indigenous lands back to FUNAI and the Ministry of Justice. In response, President Bolsonaro issued [Provisional Measure 886/2019](#), which again transferred this responsibility to the Ministry of Agriculture. This measure was then the subject of constitutional complaints submitted by three different parties to the Supreme Court of Brazil. The tribunal [upheld](#) its consolidated jurisprudence by saying that Provisional Measure 886/2019 was unconstitutional. It explained that pursuant to Article 62 of the Brazilian constitution, the government may not reissue a provisional measure twice in the same legislative session. Thus, the demarcation of indigenous lands must remain the responsibility of FUNAI at least until the end of the current legislative session in December 2019.

## **Future of indigenous lands in Brazil**

In Brazil, conflicts over indigenous territories have been constantly evolving. With the adoption of the 1988 Brazilian constitution, which is in line with [international standards](#) on indigenous land rights, Brazil made a significant step toward a

comprehensive protection of indigenous lands. The effective protection of indigenous territories is not, however, the present reality. In fact, the current situation is one that sees many proposals to [amend](#) the constitutional provisions protecting indigenous peoples in order to suspend the effect of indigenous land demarcation or to change the statutory scheme identifying and demarcating indigenous territories. Complicated by the large, intense, and persistent [fires burning in the Brazilian Amazon](#), home to the majority of indigenous peoples, the situation in Brazil is extremely sensitive. The long-term fate of indigenous lands is still unclear, as is that of indigenous peoples themselves. Ultimately, the fate of each will depend on the choices made by Brazilian society, including indigenous individuals and peoples, and the international community.

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